IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1023 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SALIM NURMOHMAD HAVELIWALA CONVICT PRISONER - Applicant(s)
Versus
THE STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :

MS. MADHUBEN SHARMA WITH MS. SUBHADRA G PATEL for Applicant(s) : 1,
MR.DIPEN DESAI APP for Respondent(s) : 1, 3,
RULE SERVED BY DS for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 31/07/2007

ORAL JUDGMENT

1. The petitioner-convict has, claiming benefit of the provisions of Section 428 of the Code of Criminal Procedure, 1973 (for short, “the Code”), prayed for calculation of his period of

imprisonment from 22.03.1995 to 18.03.1997 as the period required to be set-off against the term of imprisonment to which he was sentenced after conviction in T.A.D.A. Case No.22 of 1996.

2. The simple admitted facts of the case are that the petitioner was arrested on 25.07.1994 pursuant to three cases pending against him, out of which, he was acquitted in two cases. In the first case registered as I-C.R.No.92 of 1994, he was ordered to be released on bail on 22.03.1995. Similarly, in the second case registered as I-C.R.No.28 of 1994, he was arrested and released on bail on the same dates. However, he continued to remain in jail pending trial pursuant to the third case registered in Gaekwad Haveli Police Station as I-C.R.No.60 of 1994 and, in that case, he was released on bail on 19.03.1997. At the end of trial, the petitioner was convicted in the first case and acquitted in the second and third cases. He was considered to be in jail only for the period from 25.07.1994 to 22.03.1995 for the purpose of set-off in the first case, although, in fact, he remained in jail after 22.03.1995 upto 18.03.1997 pursuant to the third case being I-C.R.No.60 of 1994.

3. Learned counsel for the petitioner relied upon judgment of the Hon'ble Supreme Court in

State of Maharashtra and another V/s. Nazakat Alia Mubarak Ali [(2001)6 SCC 311] and particularly emphasized the observations quoted hereinunder:-

> “16.....In other words, if the convict was in prison, for whatever reason, during the stages of investigation, enquiry or trial of a particular case and was later convicted and sentenced to any term of imprisonment in that case the earlier period of detention undergone by him should be counted as part of the sentence imposed on him.”
>
> “17.....
> 18. Reading Section 428 of the Code in the above perspective, the words “of the same case” are not to be understood as suggesting that the set-off is allowable only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which the accused was in prison subsequent to the inception of a particular case, should be credited towards the period of imprisonment awarded as sentence in that particular case.....”

3.1. Differing from the above opinion of His Lordship Justice K.T. Thomas, Hon'ble Justice R.P. Sethi recorded in his separate opinion as under:-

> “32. The accused tried for various offences in one trial can be held to be entitled to the benefit of Section 428 of the Code being tried for the “same case”. The words “same case” appearing in the section are *ejusdem generis* to the preceding words “investigation, enquiry or trial”. If the period of detention relating to investigation, enquiry or trial is in a different case, that would not *ipso facto* entitle the accused to claim the benefit of Section 428 but that may permit him to persuade the Court to pass appropriate orders in terms of Section 427, keeping in view the period of his undertrial detention in other cases as well. It is the need of the time that the court convicting the accused should develop a healthy practice of specifying in the order the total period of pre-conviction detention that he has undergone in that case or in some other case for the purposes of awarding the sentence upon conviction.”

And, in the opinion of His Lordship Justice S.N. Phukan, it is observed that, in addition to the views expressed by His Lordship Justice Thomas, a para was required to be added which reads as under:-

> “44. The only question which according to me needs consideration is the true effect of the expression “same case” as appearing in Section 428 of the Code of Criminal Procedure. The provision is couched in clear and unambiguous language and states that the period of detention which it allows to be set-off against the term of imprisonment imposed on the accused on conviction must be one undergone by him during investigation, enquiry or trial in connection with the “same case” in which he has been convicted. Any other period which is not connected with the said case cannot be said to be reckonable for set-off. The view of learned Brother Mr. Justice Thomas according to me accords (sic) the legislative intent. Acceptance of any other view would mean necessary (*sic* necessarily) either adding or subtracting words to the existing provision, which would not be a proper procedure to be

adopted while interpreting the provision in question."

4. It must be noted that the above three separate opinions were recorded in the case wherein the accused had been convicted and sentenced to imprisonment in two criminal cases. As the accused was arrested on the same day in connection with both the cases, he remained in jail as an undertrial prisoner during the same period in both cases. The question before the Court was: was it permissible for him to claim the benefit of set-off envisaged in Section 428 of the Code of Criminal Procedure in both the cases? The facts in the present case are slightly different and completely covered by the plain language of the provisions of Section 428 of the Code. Admittedly, in the facts of the present case, the petitioner was not sentenced to imprisonment for the offence in respect of which he was in detention from 22.03.1995 to 18.03.1997. He was in detention for the period from 25.07.1994 to 22.03.1995 in connection with the case in which he was convicted and sentenced to imprisonment. Section 428 of the Code clearly provides that, where an accused person has been convicted and sentenced to imprisonment for a term, the period of detention undergone by him during the investigation, enquiry or trial of the

same case, shall be set-off against the term of imprisonment imposed on him on such conviction.

5. Therefore, in the facts of the present case, not only that the provisions of Section 428 clearly denied the benefit of set-off of the subsequent period but the interpretation put upon the provision by a majority in the aforesaid judgment of the Hon'ble Supreme Court also confirmed the view that it is only the period of detention undergone by the petitioner during the investigation, enquiry or trial of the same case in which he was convicted, which was required to be set-off against his term of imprisonment and no other period of detention undergone pursuant to any other case could be set-off against the term of sentence. In that view of the matter, the relief claimed by the petitioner cannot be granted. Accordingly, the petition is dismissed and Rule is discharged with no order as to costs.

(D.H.WAGHELA, J.)

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